IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.12.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
and
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Writ Appeal Nos.1384 to 1388 of 2003

1. Union of India
   rep.by its Secretary
   Ministry of Finance
   North Block
   New Delhi

2. The Commissioner of Customs
   Custom House
   Chennai - 600 001

3. The Director General of Foreign
   Trade, Ministry of Commerce
   Udyog Bhavan, New Delhi - 110 011

4. The Joint Director General of
   Foreign Trade, No.38 & 39,
   Whites Road
   Royapettah
   Chennai - 600 014. .... Appellants in all W.As

v.

M/s.Tamilnadu Dadha Pharmaceuticals
Limited, represented by its
Managing Director
Chennai - 600 014. ... Respondent in all W.As

Writ Appeal Nos.1384 to 1388 of 2003 are filed against the common order dated 11.9.2000 passed by the singe Judge in W.P.Nos.7888 to 7892 of 2000.

For appellants : Mr.V.T.Gopalan,
Addl.Solicitor General
assisted by Mr.P.Wilson
Asst.Solicitor General

For Respondent :Mr.A.L.Somayaji,Sr.Counsel
for Mr.A.Ramesh Kumar

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JUDGMENT

K.RAVIRAJA PANDIAN, J.

The correctness of the common order of the learned single Judge dated 11.9.2000 in allowing the writ petitions filed by the respondent herein in W.P.Nos.7888 to 7892 of 2000 seeking for the relief of writ of mandamus directing the respondents/appellants herein to complete discharge of the bonds dated 28.12.1993, 20.7.1994, 8.12.1994, 12.9.1994 and 16.11.1994 executed by the writ petitioner/respondent herein for the due performance of the export obligation under licence bearing Nos.34358, 401670, 401265, 402523 and 403095 respectively dated 23.12.1993, 30.6.1994, 28.4.1994, 7.9.1994 and 26.10.1994 respectively, is put in issue in these appeals

2. The facts of the case go as follows:

The respondent Company was manufacturing and exporting drugs by importing certain drugs meant for manufacturing the finished formulation for export purpose. During the year 1992, the Government of India announced its export and import policy. Under Chapter XVII of the Export and Import Policy, for the period from 1992 to 1997, duty exemption schemes were framed and explained. Under clause 49, a scheme called "Value Based Advance Licence Scheme" has been introduced. The object of the said scheme was to provide raw materials and components to exporters duty free. Under the said licence, any inputs specified in the licence could be imported duty free for the CIF value stated in the licence. The licensee is obliged to export the manufactured drugs to the value and quantity mentioned in the licence.

3. Under the Scheme, the respondent applied for and obtained five licences for import of inputs stated in the licence. Under the licences, the respondent imported the inputs upto the permitted CIF value, manufactured resultant drugs and exported the same to the quantity and FOB value prescribed in the licence within the period prescribed for.

4. The respondent as required by the appellant for the due performance of the export obligation has executed a legal undertaking, undertaking to indemnify the Department in case of default in the export obligation with the condition that on the performance of the export obligation, the legal agreement entered into by the respondent would be discharged and returned back. However, in spite of repeated requests for the reasons best known the appellant refused to discharge and return back the legal agreement. With these averments, the respondent filed the writ petition seeking for the relief as stated supra.

5. The appellant defended the case by contending that the

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respondent as per the policy ought to have imported individual input under separate licences and should have exported individual resultant products to the quantity and value fixed by the licensing authority. They defaulted in obtaining single licence for several inputs. For this reasons, they are not entitled to get the legal undertaking discharged.

6. The learned single Judge after hearing the parties and on the reasoning that the objection of the appellant Department that the respondent had not filed individual applications in respect of each input could not be legally sustained in the absence of any such requirement either under the notification or in the bonds executed by the respondent granted the relief as prayed for.

7. Learned counsel appearing for the appellant has contended that as per the Export and Import policy and procedure of the year 1992-97, the respondent ought to have applied for separate advance licence for each of the input and ought to have exported the prescribed quantity of resultant products. The respondent has applied for several inputs in one application. The respondent in their application given the individual CIF value for the items to be imported. As a matter of export promotion, the Joint Director General of Foreign Trade issued single licence for more than one resultant product. It is incumbent upon the respondent to fulfill the value addition for each resultant product. It was further argued that as per Paragraph No.49 of the Hand Book of Procedure relevant to the year, there could be flexibility within the range of products that could be imported as against an exportable product, but an exporter could not mix up the raw material that could be imported as between different exportable products. It was further contended that it was the duty of the authorities to grant individual and independent licence for each exported product. But in this case, a compendious licence has been issued for several exportable products based on the application of the respondent. The respondent had not specified the value addition for each exportable product in accordance with the standard input and output norms. Hence, the respondent is not entitled to get discharged its legal agreement.

8. On the other hand, the learned counsel for the respondent contended that the the value based advance licence has been granted by the licensing authority. As per the licence, the respondent has imported the inputs for the licence stated value and exported the resultant products for the FOB value stated in the licence and thereby fulfilled the export obligations within the period of twelve months granted for such fulfillment. Several conditions were attached with the licence. All the conditions of licence have been complied with. There is no such condition incorporated in the licence as contended by the Department. Hence the appellant cannot contend otherwise now.

9. We heard the argument of the learned counsel on either

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side and perused the materials on record.

10. The only dispute in these cases is whether the respondent has complied with the conditions incorporated in the licence and entitled to get the letter of undertaking discharged?

11. In order to resolve the issue we have to see whether the conditions incorporated in the licence and any other incidental conditions thereto have been complied with by the respondent so as to claim the relief.

12. We have taken the licence No.401265 as a typical licence. In the said licence, the respondent was permitted to import the following items:

"(1) VINCRISTINE SULPHATE (BULK DRUG),
(2) CARBAMAZEPINE (BULK DRUG),
(3) RIFAMPCIN (BULK DRUG)
(4) DEXASMETHASONE SODIUM PHOSPHATE (BULK DRUG)."

The approximate C.I.F. value for which the respondent was permitted to import the drug is stated as Rs.351968/-. The limiting factor for the purpose of clearance through Customs was stated to be the value only and the period of shipment was stated to be valid for 12 months. The FOB value has been stated as Rs.993625 equivalent to US $ 31796 and the export obligation period is 12 months. The other conditions attached to the licence are as follows:

"The Licencees shall export to any country other than Africa, south west Africa, Iraq, Fiji and Federal Republic of Yugoslavia (serbia & Montenegro) the resultant product(s) of the quantities and value specified below within a period of 12 months from the date of issue of licence.

| Resultant products | Qty | NUMBER | FOB (Rs) | FOB US$) |
|---|---|---|---|---|
| (1) VINCRISTINE SULPHATE INJ USP TMG/1ML | 25900 | NUMBER | 707,125. | 22,628.00 |
| (2) CARBANZEPINE TABS BP 200MG | 780000 | NUMBER | 170,875. | 5,468.00 |
| (3) RIFAMPIN CAPS USP 150MG | 100000.00 | HUNDRED IN | 78,125. | 2,500.00 |
| (4) DEXAMETHASONE SODIUM PHOSPHAT INJ USP 4MG/ML | 10000 | NUMBER | 37,500. | 1,200.00 |

13. Further, the following conditions are also attached to the licence:

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(1) The foreign exchange remittance against this licence will be governed by the guidelines issued by the Reserve Bank of India from time to time.

(2) Denier of import and export should be same, in case the import item is Natural/Manmade fibre.

(3) Export will be subject to Export Policy in force.

(4) For sensitive items customs to carry out necessary checks.

(5) The licensee shall deliver or cause to be delivered to this office within 30 days from the date of expiry of the export obligation period stated above documents as prescribed in para 126 of hand book 1992-97 from time to time as evidence to prove fulfillment of export obligation imposed on this licence.

(A) no import of any consignment against this licence shall be allowed to be cleared by the customs authorities covered unless a Legal Undertaking/Bond backed by Bank Guarantee for a value equivalent to one and half times the customs duty saved (para 118 of Hand Book 1992-97) is executed by the licensee( and the supporting manufacturer M/s... (which ever is necessary) with this office in the form prescribed in Appendix-XXXIV of the Hand Book of import export procedure 1992-97 and endorsement of that effect is made by this office on the import part of the DEEC issued along with this licence. The Licence for any extension that may be granted by this office on request from the licensee.

(A) No import of any consignment against this licence shall be allowed clearance by the customs authority concerned unless a LEGAL-UNDERTAKING in the form prescribed in appendix-XXXIV of the hand book of import export procedure 1992-97 is executed by this office and endorsement to that effect is made by this office on the import part of the DEEC along with this licence.

(7) The exempt goods imported against this licence shall only be utilised in accordance with the provision given in chapter-19 of the import export policy 1992-97 and the concerned customs notification incorporated therein.

(8) In the event of the licensee failing to (A) fulfill the export obligation within the prescribed time limit stipulated above and or (8) to produce the prescribed documents information with in the 30 days after the expiry of the export obligation period the BOND/LUT agreement conditions shall be enforced and the licensee shall be liable to the different follow-up, penal actions prescribed in the import export policy and hand book of procedures 1992-97. The licensee shall also

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pay without demur to the customs authority concerned duty on the proportionated quantity of goods corresponding to the products not exported. Any short fall will also be liable to the adjustment from any application for licence pending in this office or received in future.

(9) The licence holder shall send quarterly report to this office giving details of import made against this licence goods manufactured and the goods exported in discharge of the export obligation on this licence.

(10) The licence holder shall maintain a true and proper account of consumption and utilisation of imported goods as required in terms of para 130 of the Hand book 1992-97.

(11) The action in clause 11 shall be without prejudice to any other action that may be taken against the licence under the foreign trade (development and regulation) act, 1992.

(13) The CIF value of Import Item No.(1) i.e., LEATHER ACCESSORIES not exceed 25% of the FOB value of exports.

(14) The CIF value of Import Item NO.(2) i.e., CONSUMABLES restricted to percentage as specified in the foot note against the serial NO..... of the norm specified.

(15) The CIF value of import of Item No.(3) i.e., LEATHER CHEMCIALS items should not exceed 12% of the FOB value of export.

(16) Interchangeability of CIF value of Item NO.1,2, and 3 are not (repeat not) allowed

(17). (1) The individual CIF value of all items of imports bearing Customs duty (Basic and auxillary) from zero to 10%.

(17). (2) The individual CIF value of any item of import which constitutes upto 2% by weight/quantity in an export product shall not (repeat not) be utilised for import of other items permitted in this licence.

(18) The C.I.F. Value of Sensitive items shall not be utilised for any other items.

(19) In terms of para 109(C) of handbook of procedures 1992-97, the exporter shall account the import of sensitive items allowed under this licence in their DEEC book Part II and get attested by customs authority.

(20) This Licence is issued subject to the conditions laid under the footnote/General note given under the Sl.No. 0 of Product Group CHEMICALS & ALLIED PRODUCTS of the Imports & Exports Procedures 1992-1999 (Vol-II)".

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14. The respondent was issued with Duty Exemption Entitlement Certificate in which also the materials imported against the licence No.401265 dated 28.4.1994 are specified under Part C as stated in the licence. The Duty Exemption Entitlement Certificate further stated that the materials stated would be eligible for exemption from import duty subject to the conditions specified in the Notification of the Government of India, Ministry of Finance, Department of Revenue and Banking No.203/92- Cus dated 19.5.1992. It is also stated therein that the legal agreement for one and half times of the customs duty saved has been executed by the respondent. As seen from Part 'D' of the Duty Exemption Entitlement Certificate, the respondent imported 200Kgs of Carbamazepine B.P. 88 under Bill of Entry No.6615 dated 9.2.1995 to the C.I.F. Value of Rs.331275 assessable value of Rs.334588/- and cleared the same on 1.3.1995.

15. The Notification No.203/92 Customs, dated 19-5-1992 referred to in the Duty Exemption Entitlement Certificate is extracted below:

"Notification No.203/92-Cus.,

dated 19-5-1992

Value based advance licence.Scheme-goods imported against

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India, against a Value based Advance Licence (hereinafter referred to as the said licence) issued on or before 31st March, 1995 in terms of para 49 of the Export and Import Policy 1 April 1992 - 31 March 1997, from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act, subject to the following conditions, namely :-

(i) that the materials imported are covered by a value based Duty Exemption Entitlement Certificate (hereinafter referred to as the said certificate), issued by the Licensing Authority in the form specified in the Schedule annexed to this notification;

(ii) that the importer at the time of clearance of the imported materials-

(a) produces proof of having executed a bond or a

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legal undertaking before the Licensing Authority concerned, for complying with the conditions of this notification; and

(b) makes a declaration before the Assistant Commissioner of Customs or Deputy Commissioner of Customs binding himself to pay on demand an amount equal to the duty leviable but for the exemption, on the imported materials in respect of which the conditions specified in this notification have not been complied with

Provided that a bond or a legal undertaking and the declaration shall not be necessary in respect of imports made after discharge of export obligation in full, as evidenced by endorsement of Licensing Authority in the said certificate;

(iii) that the said licence and the said certificate are produced before "the proper officer of customs at the time of clearance of imported goods out of customs control.

Provided that no such imported materials shall be permitted clearance under this notification unless a debit entry has been made, in the said licence and the said certificate, by the proper officer of customs;

(iv) that the imports and exports are undertaken from sea ports at Bombay, Calcutta, Cochin, Kandia, Mangalore, Marmagoa, Madras, Nhava Sheva, Paradeep, Tuticorin and Visakhapatnam, or through any of the airports at Ahmedabad, Bangalore, Bombay, Calcutta, Delhi, Jaipur, Varanasi, Srinagar, Trivandrum, Hyderabad and Madras or through any of the Inland Container Depots at Bangalore, Coimbatore, Delhi, New Gauhati Goods Shed, Moradabad, Ludhiana and Hyderabad.

Provided that the Commissioner of Customs may by special order and subject to such conditions as may be specified by him, permit imports and exports from any other sea port, airport, land customs station or inland container depot;

(v) that the export obligation is discharged, within the period specified in the said certificate or within such extended period as may be granted by the Licencing Authority, by exporting goods manufactured in India in respect of which -

(a) no input stage credit is obtained under rule 56A or 57A of the Central Excise Rules, 1944 (hereinafter referred to as the said rules);

(b) facility, under rule 191A or rule 191B as in

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force immediately before the 1st October, 1994, or under rule 12(l)(b) or rule 13(l)(b) of the said rules, has not been availed; and

(c) drawback has not been claimed either under section 74 of the Customs Act, 1962 or Customs and Central Excise Duties Drawback Rules, 1971;

(vi) exempt materials shall not be disposed of or utilised in any manner, except for utilisation in discharge of export obligation, before the export obligation under the said licence has been discharged in full and export proceeds realised.

Provided that Acetic Anhydride in respect of which the benefit of this notification is claimed shall be utilised by the importer in his own factory or in the factory of any other manufacturer indicated in the said certificate even after discharge of export obligation and realisation of export proceeds;

(vii) where benefit of the notification is sought by a person other than licencee, such benefit shall be allowed against the said licence and the said certificate only if it bears endorsement of transferability by the Licensing Authority.

Provided that benefit of this notification shall not be allowed to a transferee of licence for import of Acetic Anhydride except where the licence is endorsed for transferability before 24th November, 1993, and is transferred to an actual user who undertakes to use the Acetic Anhydride in his own factory;

(viii) Notwithstanding anything contained in conditions (vi) and (vii) above, the endorsement of transferability or disposal of materials shall be allowed in respect of licences issued for the export of all kinds of writing instruments (including gift sets and refills/nibs) on fulfilment of export obligation only in favour of manufacture of writing instruments.

*Explanations.* - In this notification, -

(i) "Export and Import Policy April 1992 - March 1997" means the Export and Import Policy 1 April 1992 - March 1997 published vide Public Notice of the Government of India in the Ministry of Commerce No. 1-ITC (PN) /92-97, dated the 31st March, 1992 as amended from time to time.

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(ii) "Licensing Authority" means an authority competent to grant a licence under Imports (Control) Order, 1955 made under the Imports and Exports (Control) Act, 1947 (18 of 1947).

(iii) "Materials" means -

(a) raw materials, components, intermediates, consumables, computer software and parts required for manufacture of export product.

Provided that in the case of electronic goods and all kinds of writing instruments (including gift sets and refills/nibs), all export items covered by one serial number in the Standard Input Output and Value Addition norms as contained in Handbook of Procedures, *1992-97*, Volume-11, published, vide Public Notice No. 121(PN)/92-97, dated the 31st March, 1993, of the Government of India in the Ministry of Commerce, shall be deemed to be single export product.

Provided further that nothing contained in this notification shall apply to import of Acetic Anhydride against licences issued after 24th November, 1993, except where such licences together with the quantity required for manufacture of the export product mentioned therein have been issued with the approval of Advance Licensing Committee in the office of the Director General of Foreign Trade;

(b) spares and mandatory spares, within a value limit of 5% of the value of the licence issued upto the 31st March, 1993, which are required to be exported along with the export product; and

(c) packaging materials required for packing of export product..."

16. On a careful perusal, we are of the considered view that neither the licence and the conditions attached thereto extracted above nor the Duty Exemption Entitlement Certificate nor the notification referred in the aforesaid Certificate required that the licensee shall apply individual licence in respect of individual input. The conditions attached thereto have been duly complied with by the respondent. As stated supra, the respondent has imported Carbamazepine BP 88 200 kgs for the CIF value of Rs.3,31,275/-, assessable value of Rs.3,34,588/- and got it cleared from the Customs Authority. It is an undisputed fact that the respondent has exported the resultant product to the FOB value of Rs.9,93,625/- and the quantity stated in the licence and thus discharged its export obligation, both value and quantitywise.

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17. The reliance of the appellant on Clause 49 of Chapter VII of Duty Exemption Scheme for the relevant year was also to the effect that under a Value based Advance Licence, any of the inputs specified in the licence might be imported within the total CIF value indicated for those inputs, except inputs specified as sensitive items. The sensitive items might be imported only to the extent of the quantity or value specified in the licence. However, flexibility shall be available for the import of sensitive items in excess to the extent of 20 percent its quantity indicated in the licence, which the over all CIF value of a value based advance. This flexibility shall not be admissible where the import restriction for a sensitive item is only in terms of value.

18. In this case, we are not concerned with the sensitive item as the input imported by the respondent is admittedly not a sensitive item. As per Clause 49, the licence was issued for importation of the inputs specified in the licence by stating the CIF value for those inputs. It is true that the CIF value for each of the inputs or items allowed to be imported has not been stated in the licence. In the absence of any such prescription as to the CIF value of each of the inputs for which licence was granted, and on the contrary, the CIF value has been given without reference to each of the inputs, the appellant cannot now impose a new condition, which is not available either in the licence or in the notification. It is further contended that licence should have been granted for each of the inputs separately by specifying the CIF value for import of the inputs. Admittedly, in this case, the licence has been granted by the licensing authority, who is very well aware of the exemption scheme. If the licensing authority was of the view that the licence has been wrongly issued, he would have immediately taken remedial measures either to cancel the licence or incorporate CIF value for each of the items allowed to be imported or granted independent licences for independent inputs with necessary details as argued. Having granted a compendious licence for several items of inputs without specifying the CIF value for each one of the items, allowed to be imported and the resultant products were also allowed to be exported, now it is not available to the appellant to contend otherwise, particularly, when all other conditions incorporated in the licence and the notification have ben complied with by the respondent.

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19. For the fore-going reasons, we see no reason to interfere with the order passed by the learned single Judge and the appeals fail and the same are dismissed. However, there is no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Secretary
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   North Block
   New Delhi

2. The Commissioner of Customs
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+1cc to Mr.P.Wilson, Advocate Sr 74576
+1cc to Mr.A.Ramesh Kumar, Advocate Sr 74414

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